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GENERAL COUNSEL
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In the Matter of)

DIGITAL PERFORMANCE RIGHT IN)
SOUND RECORDINGS AND)
EPHEMERAL RECORDINGS)

No. 2000-9
CARP DTRA 1 & 2

REBUTTALCASE OF PUBLIC RADIO

Rebuttal Testimony of Public Radio

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October 10, 2001

PUBLIC VERSION

Rebuttal Testimony of E. Jane Murdoch and John R. Woodbury

In the Matter of

Digital Performance Right

in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9

CARP DTRA 1&2

PUBLIC VERSION

I. Introduction

1. We have been asked to respond to testimony of witnesses appearing on behalf of the Recording Industry Association of America (RIAA) insofar as that testimony is relevant to the fee proposal for public radio websites put forth in our direct written testimony.¹ In addition, we have been asked to provide a recommended minimum license fee for public radio websites. Finally, we have been asked to respond to the Panel's requests for (1) information that would allow it to translate a fee structure chosen for other webcasters to a fee structure for public radio websites and (2) a proposed fee structure for noncommercial educational and other noncommercial radio stations that are not represented by National Public Radio (NPR) and the Corporation for Public Broadcasting (CPB) in this proceeding but that may offer audio programming on websites.
2. We begin in Section II by discussing evidence consistent with fees for the performance right in sound recordings that are no higher than fees for the performance right in musical works. In Section III, we discuss the somewhat ambiguous RIAA testimony to date concerning the appropriate treatment of public radio webcasters relative to commercial webcasters. We reiterate the reasons public radio webcasters should expect to pay lower fees than commercial webcasters and note the general agreement on these points found in RIAA testimony. We also refute logic that the RIAA has introduced, somewhat tentatively, which would lead to identical license fee rates for public radio and commercial webcasters.
3. In Section IV, we respond to the Panel's request for guidance in transforming commercial license fee rates to public radio license fee rates. Our response is limited by a lack of the data necessary to address the full range of license fee structures we can envision. Section V discusses factors affecting the determination of a reasonable minimum fee for public radio websites and reviews minimum fees observed elsewhere. Section VI discusses the determination of fees for public radio websites that are not represented in this hearing because the entities operating those sites are neither NPR, Minnesota Public Radio (MPR), NPR-member stations, nor stations that are qualified to receive funding from the CPB. Finally, we have attached as Appendix B, the demonstrative chart requested by the Panel showing the

¹ "Deriving a Reasonable License Fee for the Performance Right in Sound Recordings of Music Performed on Public Radio Websites," April 9, 2001. (Hereinafter, Murdoch and Woodbury written testimony.) Throughout this testimony, except where noted, the term "public radio" refers to National Public Radio (NPR), Minnesota Public Radio, NPR-member stations, and public radio stations that are qualified to receive funding from the Corporation for Public Broadcasting.

amount of royalties we propose for public radio for the periods October 1998 through December 2000 and for 2001 and 2002.²

II. Musical Works Performance Rights Fees as a Ceiling on Sound Recording Performance Rights Fees for the Same User

4. We disagree with Professor Wildman's conclusion that "license fees that digital audio services pay to perform musical works are not a valid benchmark for determining the license fees that those services would pay in a free market to perform sound recordings."³ Much of Professor Wildman's argument consists of establishing that reproduction and distribution rights of musical compositions are sold in different markets from sound recordings. However, his logic that "consequently" license fees for *performances* of musical works are not a valid benchmark for license fees for *performances* of sound recordings is simply a non sequitur.⁴ Rather than comparing transactions for musical works and sound recordings, the relevant transactions to compare are those for *performance rights* in musical works and *performance rights* in sound recordings.⁵
5. In his oral testimony, Professor Wildman also makes much of statements by the Panel and by the Register of Copyrights in the Copyright Arbitration Royalty Panel (CARP) proceeding to determine reasonable fees for performance rights in sound recordings paid by digital audio subscription services.⁶ [[]]. Professor Wildman claims that if there was insufficient evidence to determine the sound recording right is more valuable, there was also insufficient evidence to determine that it is less valuable. In fact, the relevant inquiry for the Panel and for the Register was whether to raise the upper bound on the range of reasonable fees for sound recording performance rights, so the only question they addressed was whether sound

² Order by the Panel, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, September 10, 2001. Public Radio's Proposed Terms and Conditions are set forth in the Revised Proposed Rates and Terms for Royalty Fees for the Digital Public Performance and Ephemeral Recording of Sound recordings by Eligible Nonsubscription Transmissions and Transmissions to a Business Establishment, filed by the Services.

³ Written testimony of Professor Steven S. Wildman, April, 2001, p. 13. (Hereinafter, Wildman written testimony.)

⁴ Wildman written testimony, p. 13.

⁵ This conclusion is not new. The Register of Copyrights noted that evidence comparing the value of the reproduction and distribution rights of musical compositions with the revenues flowing to record companies from sales "sheds no light on the relative value of the sound recording performance right and the musical works performance right." See Final Rule and Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Docket No. 96-5 CARP DSTR, *Federal Register*, Vol. 63, No. 89, May 8, 1998, p. 25405. (Hereinafter, Final Order, Digital Audio Subscription Services CARP.)

⁶ Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Docket No. 96-5 CARP DSTR. (Hereinafter, the Digital Audio Subscription Services CARP.)

recording performance rights might command a higher price than musical work performance rights, and they concluded that it did not.

6. To the extent that owners of sound recording performance rights expect to derive greater returns from public performances through the sale of compact discs, one would expect them to discount the price of their performance rights more than would owners of performance rights in musical works, and, in fact, the returns to the recording industry from the sale of sound recordings are larger than the returns to owners of the performance rights in musical works.⁷ [[]] Authors and composers do not expend the same level of effort and resources to have their works played on the radio. Based on the relative promotional efforts observed in broadcast radio, one would expect the fees for sound recording performance rights to be discounted more heavily than fees for musical works performance rights.
7. Our knowledge of the relative magnitude of rights fees for radio broadcasts in Europe, where performance rights in both musical works and sound recordings exist, is consistent with both the economic analysis and the findings discussed above. Through our participation in the Digital Audio Subscription Services CARP proceeding, we were provided with data on the license fee rates for performance rights in sound recordings and musical works in eight European countries.⁸ Using these data, we found that the population-weighted average fee rate for performing musical works was 4.6 percent of net advertising revenues, compared to 3.1 percent of net advertising revenues for performing sound recordings.⁹ Thus, the weighted-average fee for sound recording performance rights was 33 percent lower than the weighted-average fee for performance rights in the musical works.¹⁰
8. We have relied on the conclusion by the Panel and subsequently by the Librarian of Congress in the Digital Audio Subscription Services proceeding that the license fees for rights in sound recordings should be no greater than fees for rights in musical compositions.¹¹ That conclusion is consistent with our observation of the relative efforts made by the recording industry and owners of musical works to gain airplay on radio stations, and it is consistent with our observation of relative performance

⁷ Written testimony of Professor Adam B. Jaffe, April 6, 2001, pp. 43-47.

⁸ The data were compiled in a 1995 report prepared for Music Choice Europe by a company called European Entertainment Consultants. Because we did not undertake a study of either the market for rights or the institutional history of rate setting in Europe, we viewed the European rates as informative but not conclusive. (See Digital Audio Subscription Services CARP, Woodbury rebuttal testimony, pp. 19-20.)

⁹ Digital Audio Subscription Services CARP, Woodbury rebuttal testimony, pp. 20-21.

¹⁰ Digital Audio Subscription Services CARP, Woodbury rebuttal testimony, footnote 74. License fee rates for sound recordings were lower than license fee rates for musical works in all countries except France. (See Digital Audio Subscription Services CARP, Woodbury rebuttal testimony, p. 20.)

¹¹ Final Order, Digital Audio Subscription Services CARP, pp. 25410 and 25413.

rights fees in Europe. By adopting the upper bound on the likely price of performance rights in sound recordings, we have been conservative in our implementation of this conclusion.¹²

III. Fee Rates Charged to Public Radio Webcasters Should be Lower Than Those Charged to Commercial Webcasters

9. To date, the RIAA has made a single fee proposal that would apply to all website licensees. Whether the RIAA will put forth a separate fee proposal for public broadcasters in its rebuttal case is unknown at the time of writing this report.¹³ In this section, we limit our response to what we have been able to discern regarding the RIAA's thinking about the appropriate treatment of public radio webcaster licensees relative to commercial licensees.¹⁴
- 10.
11. Clearly, the entities that the RIAA has licensed differ from public radio webcasters in ways that affect the determination of reasonable license fees.¹⁵ First, the public radio webcasters are constrained by statute in their ability to pass costs through to third parties. Second, webcasting is viewed by public radio webcasters as a means of furthering their educational mission, not as a "business of providing DMCA-compliant music."
12. The RIAA recognizes these important differences between commercial and non-commercial broadcasters: [[]]
13. [[]]

¹² The promotional value to the recording industry of sound recording performances on public radio websites will be positively correlated with webcast audience size. If webcasting audiences grow, and promotional effects become more significant in the future, we expect public radio webcasters will wish to explicitly factor promotional considerations into calculations of reasonable fees.

¹³ We understand that the RIAA, in submitting its fee proposal, kept open the possibility that it might propose different rates for public broadcasters. (See oral testimony of Steven M. Marks, pp. 10419-10420.)

¹⁴ We are in no way endorsing the application of the RIAA's proposed fee rates for commercial webcasters and we do not believe the RIAA's proposed rates could serve as a reasonable benchmark for fees to be paid by public radio webcasters. We are relying on expert testimony by Professor Jaffe to identify the flaws in the RIAA's proposal.

¹⁵ Mr. Marks characterized one licensee, Radiofreeworld.com, as "reminiscent of an eclectic public radio station." (See written testimony of Steven M. Marks, p. 24.) In his oral testimony, Mr. Marks explained the similarity, "In terms of the type of programming in music that you might hear on a public radio station, it's similar." (See oral testimony of Steven M. Marks, pp. 10418-10419.) Similarity of music genres has never been an important distinguishing factor in the choice of reasonable benchmarks. Indeed, when pressed as to whether he was suggesting that the RIAA's agreement with Radiofreeworld is a comparable agreement for public radio, Mr. Marks said, "Not necessarily. I think we said in our rate proposal that we reserve the right to propose different rates for non-commercial services." (See oral testimony of Steven M. Marks, p. 10419.)

Notwithstanding the differences between public radio webcasters and commercial webcasters – differences which have led to significant license fee differentials in the broadcast arena [[]].

14. [[]] Yet ASCAP, BMI, and SESAC have all consistently charged public broadcasters lower license fee rates than they have charged commercial broadcasters – in negotiated settlements as well as in Copyright Royalty Tribunal (CRT)- and CARP-imposed outcomes.

IV. The Application of Reasonable Benchmark Fees Set for Other Parties to Determine Fees for Public Radio Webcasters

15. The Panel has raised the possibility that it might choose to establish fees for public radio entities based on one or more benchmark rates presented by other parties to the proceeding. In light of this possibility, the Panel has requested that public radio supply evidence that would quantify any adjustments deemed necessary to translate benchmark fee rates for a commercial party to fee rates for itself.¹⁶
16. In general, and as was discussed in our first report, benchmark fee rates are adjusted to account for differences in circumstances, music use, and the scale of activity between the licensee in the benchmark situation and the licensee in the current situation. The choice of adjustment factors is particularly critical to the outcome when the licensee in the benchmark case is not similar to the licensee in the current situation in terms of its business model or the nature of its music use. The difficulty in identifying and measuring the correct adjustment factors and the important impact the choice of adjustment factors may have on the level of fees established has led CARP and CRT panels and rate courts to choose benchmarks that are as similar as possible between music users and uses in the benchmark setting and the setting at issue.
17. The complexities of deriving fees for public broadcasters from benchmark fees for commercial broadcasters are not trivial, and are best avoided in situations where a public broadcasting benchmark exists.¹⁷ In the case of licensing musical works

¹⁶ Order by the Panel, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, August 13, 2001.

¹⁷ For the purpose of setting music license fees, the most important differences in the business models of commercial and public broadcasters are in the manner in which revenues are generated and in the linkage between costs and revenues. In commercial radio, when costs increase, broadcasters generally are able to respond by raising the rates charged to advertisers. However, roughly 77 percent of public radio station revenues are in the form of grants and gifts from institutions and individuals, and public broadcasters have no guarantee that these revenues will rise to cover increased costs. This feature of public radio significantly constrains the ability of public broadcasters to absorb cost increases to the same degree as can commercial broadcasters. (See Report of the Panel, In the Matter of Adjustment of the Rates for Noncommercial Education Broadcasting Compulsory License, Docket No. 96-6 CARP-NCBRA, p. 24 (hereinafter, Report of the Panel, Public Broadcasting CARP) and Murdoch and Woodbury written testimony, paragraph 63.)

performances, Congress established a rate court for public broadcasters that is separate from the rate courts for commercial radio and television licensees. Most recently, in the 1998 Public Broadcasting CARP proceeding, the Panel observed in its Order that, "commercial license rates can *not* be appropriately used as a benchmark to determine Public Broadcasters' rates."¹⁸

18. Nonetheless, in response to the Panel's specific request, we have identified the nature of the adjustments that the Panel would need to recognize to derive a fee for public radio webcasters from a commercial webcaster benchmark.¹⁹ The adjustments should reflect differences in the scale of activity and in the intensity of music use. In addition, the adjustment should recognize that public radio webcasters, due to their noncommercial, educational status, would reasonably expect to pay fees for performing sound recordings that reflect their diminished ability to pay for music relative to commercial licensees.

Quantifying the Difference between Commercial and Public Radio Broadcaster Fee Rates for Musical Works in the ASCAP and BMI Repertories

19. In order to compare prices paid by commercial and noncommercial broadcasters for music rights, we once again looked to the blanket fee rates paid for performances of music in the ASCAP and BMI repertories. In the attached Appendix A, we have calculated ASCAP and BMI fee rates on a percentage-of-revenue basis and compared the rates paid by commercial radio stations to the lower rates paid by public radio stations. The lower fee rates for public radio are, in part, a reflection of public radio's less-intensive music use relative to commercial radio.²⁰ The remainder of the difference, however, is due to the Panel's judgment (based in part on prior market transactions and on an early CRT decision) that public broadcasters would pay lower fee rates than commercial radio in market transactions even if their music use and scale of activity were the same.²¹
20. In calculations presented in Appendix A, we found that public radio stations pay ASCAP effective fee rates (on a percentage-of-revenue basis) that are only

¹⁸ Report of the Panel, Public Broadcasting CARP, p. 29. (Emphasis in the original.)

¹⁹ We have not made a comparison of commercial web-only webcasters and commercial broadcaster-webcasters. To the extent that these two groups of webcasters differ in aspects that are important in the determination of reasonable fees, the one that is more similar to public radio broadcasters in those dimensions (i.e., commercial broadcaster-webcasters) is the better benchmark to use.

²⁰ The fee rates expressed as a percentage of revenues already account for differences in scale.

²¹ In the 1998 Public Broadcasting CARP, the Panel noted that, "commercial rates almost certainly overstate fair market value to Public Broadcasters and, even restricting the revenues to 'private revenues', as did ASCAP, does not fully reconcile the disparate economic models." (Report of the Panel, Public Broadcasting CARP, p. 24.) See our discussion of the Panel's findings in Murdoch and Woodbury written testimony, paragraphs 61 to 65.

11 percent of the fee rates that are paid by commercial radio stations.²² Similarly, public radio stations pay BMI effective fee rates that are only 10 percent of the fee rates that commercial radio stations pay.²³

21. Thus, we have found that public radio broadcasters obtain a discount of about 90 percent from fee rates paid by commercial radio broadcasters to ASCAP and BMI. This discount is due in part to less-intensive music use by public radio relative to commercial radio and in part to a "noncommercial adjustment factor." However, we do not have sufficient data to separate the effects of these two factors.

Implementing Adjustments to Fee Rates Proposed for Commercial Websites

22. A number of the fee proposals that the Panel might adopt have mechanisms that automatically adjust for differences in scale between licensees. This is a characteristic of fees that are calculated as a percentage of revenues or program expenses, as well as those that are calculated based on webcast listeners or listener-hours. If a commercial fee rate expressed on a revenue basis were employed by the panel as a starting point for setting public radio website fees, it would be appropriate for the panel to reduce the commercial fee rate by 90 percent to determine the fee rates to be paid by public radio webcasters.²⁴ As described above, this discount reflects both the lower music use on public radio relative to commercial radio and a "noncommercial adjustment factor" that reflects the diminished ability of public radio to pay license fees relative to commercial radio. In market transactions, such a discount would be expected, and we believe an even larger discount was observed over the three licensing periods when public broadcasters reached negotiated settlements with ASCAP and BMI.²⁵

²² In our first report, we indicated our preference for expressing fees in terms of program expenses. (See Murdoch and Woodbury written testimony, paragraph 25.) However, here, the information available to us from the discussion of ASCAP and BMI fee proposals constrained our analysis to the consideration of fees expressed on a revenue basis. (See Report of the Panel, Public Broadcasting CARP, pp. 12-17.)

²³ If we had allocated the public broadcaster ASCAP and BMI fees set by in the Public Broadcasting CARP on the basis of relative revenues of public radio and public television, public radio's ASCAP fee rate would be 13 percent of the commercial radio ASCAP fee rate, and public radio's BMI fee rate would be 12 percent of the commercial radio BMI fee rate.

²⁴ If the ratio of other measures describing the scale of public radio relative to commercial radio are about the same as the ratio of public radio and commercial radio revenues, then the same 90 percent discount factor can be applied to fees that are expressed in terms of those other measures of scale. We do not have data to allow any further comparisons. However, data cited in the Report by the Panel in the Public Broadcasting CARP proceeding indicate that BMI found public radio to be 3 to 4 percent of the size of commercial radio, as measured by revenues, program expenses, and audience size. (Report of the Panel, Public Broadcasting CARP, p. 15.) If BMI's finding is accurate, the 90 percent discount factor could reasonably be applied to fees expressed in terms of program expenses and audience, although, with respect to the latter, we do not know whether BMI's audience measure was listeners or listener-hours.

²⁵ We infer from language in the Report of the Panel in the Public Broadcasting CARP, that the difference between the fee rates for public broadcasters and commercial broadcasters was larger over the period extending from 1982

23. Of course, the determination of broadcasters' web-related, and even more narrowly web audio- and web audio music-related, revenues and program expenses is likely to be fraught with measurement and judgment issues. This is because programming expenses and revenues are due almost entirely to broadcast activities, to which webcasting is ancillary.²⁶ It is exceedingly difficult to develop meaningful program expense or revenue allocations for public radio websites. In our opinion, such measures do not lend themselves to reasonable fee calculations, at least in these early stages of public radio website existence.
24. Other metrics are possible in principle, but do not seem to be practical alternatives. For example, website listener data appear to be more readily measured, or estimated, than web-related revenue and expense data. NPR was able to obtain average simultaneous website listener data from roughly 56 percent of the public radio website operators offering audio content on their website that responded to the NPR Music Rights Survey.²⁷ Those data show that public radio station websites with audio capability and listener estimates have about 67 simultaneous listeners on average. Use of a per-listener fee that accounts for the duration of the listening would be preferred; however, most survey respondents had no information on listener-hours on their websites.
25. A fee rate expressed on a per-listener-song basis automatically adjusts for both the scale of activity and the music use of the licensee. If the Panel were to adopt a fee rate per listener-song for commercial broadcaster-webcaster licenses, the adjustment to arrive at a fee rate per listener-song for public radio websites is less clear due to the limitations of information available to us. A problem in identifying the correct adjustment factor arises because the discount rate that we were able to calculate compounds a music use adjustment factor and a noncommercial adjustment factor. The per-listener-song fee rate requires the adjustment for the noncommercial nature of public radio websites but does not require the adjustment for public radio's less-intensive music use. The Panel would find it necessary to deconstruct the 90 percent discount factor we have identified. But again, this is not a practical

through 1997 than the wedge that resulted from the fees set by the Panel in 1998: "...the Panel is cognizant that commercial and non-commercial broadcasters do, in fact, operate under different economic models and one should not be surprised that these models yield somewhat different results, including differences in fair market rates. It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates. We have concluded that they do not." (See Report of the Panel, Public Broadcasting CARP, p. 23. Emphasis in the original.)

²⁶ In making this point, we do not mean to imply that there are no additional costs associated with website activity. On the contrary, we observed in our first report that public radio stations incur incremental costs to create and maintain the technological and textual aspects of their websites.

²⁷ See Murdoch and Woodbury written testimony, Table 5. Seventy-eight divided by the sum of 78 and 62 is 56 percent.

alternative because very few, if any, public radio websites have had or currently have the capability to measure listener-songs.

V. Reasonable Minimum Fees for Public Radio Webcasters

26. The RIAA has proposed that each website pay an annual minimum license fee of \$5,000.²⁸ Such a fee would likely cause a large number of public radio stations that currently are webcasting to strip music from their webcasts or forego webcasting altogether.
27. In our written testimony, we estimated that the average simultaneous listening audience streaming from all the audio files available on public radio station websites is about 67 people.²⁹ Data recently obtained from a service that tracks activity on NPR's website indicates that only 4.4 percent of the requested audio files on the NPR site over the last 6 months were music programming files.³⁰ Thus, the audience listening to music on public radio websites likely is extremely small and would not justify the \$5,000 license fee proposed by the RIAA.
28. While the RIAA's proposed minimum fee is unlikely to meet the willing buyer standard imposed in the DMCA for many public radio stations, minimum fees observed elsewhere, [[]] are at least an order of magnitude smaller than the RIAA's proposed minimum fee. We expect that there exists a significantly lower minimum license fee for public radio websites that would meet both the willing buyer and the willing seller standard.
29. The willing seller standard of the statute implies that the license fees collected by the RIAA must offset reasonable costs of administering contracts and auditing music use for the purpose of collecting and distributing royalties. Thus, the minimum fee should cover the incremental cost the RIAA would reasonably incur to do business with licensees with limited ability or willingness to pay.³¹

²⁸ If each of the public radio entities surveyed by NPR in this proceeding paid a fee of \$5,000, the total payment to the RIAA by public radio would be just over \$2 million (\$5,000 per entity x 409 entities = \$2,045,000). This figure is roughly the same as the aggregate fee we estimate public radio would pay for a hypothetical right in sound recordings performed on its broadcasts. Clearly, it cannot be appropriate that public radio would pay the same \$2,000,000 fee for webcasts as it would hypothetically pay for sound recordings performed on public radio broadcasts when the webcasting audience is about 1 percent of the broadcast audience. (See Murdoch and Woodbury written testimony, Table 5, which estimates that the public radio webcast audience is 1.2 percent of the public radio broadcast audience.)

²⁹ Murdoch and Woodbury written testimony, Table 5.

³⁰ National Public Radio, "Music Programming Audio File Requests as a Percent of all Audio File Requests For the 6-Month Period, March to August, 2001."

³¹ In instances where webcasters pay fees on a basis that automatically adjusts for the scale of activity, a minimum fee can prevent situations in which the licensee reports such low activity that fee payments are below the minimum

The Cost of Administering a License for Public Radio Websites is Likely Low

30. We have not made a study of the incremental costs to the RIAA of administering contracts with public radio websites. However, we have made several observations that lead us to believe those costs will be relatively small.
31. First, it is important to understand that it is the incremental costs attributable to small licensees (websites with small audiences) that are of concern to the licensor. There are likely to be significant fixed costs associated with establishing a framework for collecting fees, monitoring appropriate usage, and overseeing the distribution of royalties. By the same token, there are likely to be significant economies of scale associated with the endeavor. In such a setting, a competitive firm undertaking the activities of collecting, monitoring, and distributing royalty payments would reasonably expect to defray the fixed costs of the system with revenues collected from large licensees. Any licensee that can pay a fee that covers the incremental costs of administering the contract would be licensed. Thus, it is this incremental cost of serving small licensees that reasonably guides the determination of a minimum fee.
32. Second, it is important to understand the relatively modest auditing costs that are rationally incurred with respect to small licensees. Auditing activities and efforts to establish fair distributions among sound recording rights owners are more appropriately directed to the entities that use music intensively and have large audiences because that is where such efforts may have a noticeable impact on the returns to rights owners. Because the auditing functions associated with small licensees are likely to be limited, the costs of servicing such licensees will be low compared to that of other licensees. Indeed, some licensees may perform so little music and to such small audiences that it would be rational for the collecting agent *not* to undertake any auditing activity, but instead simply to monitor the payments for a license and the continued low level of website activity and music use.
33. We have identified three factors that reduce the cost of licensing public radio entities below the costs of licensing the same number of similarly sized independent licensees.
 - a) First, license fees for the performance of broadcast musical works by the public radio stations, those fees paid to ASCAP, BMI, and SESAC, are paid by a single entity, the CPB. We understand that the same arrangement is feasible in the current setting, whereby a single payment can be made for the webcasting activities of all CPB-qualified public radio stations and NPR.

level the licensor would have accepted *ex ante*. For this reason, minimum fees that are intended to meet the willing seller standard are reasonably cast in a lump-sum fee structure.

- b) Second, much of the programming in public radio webcasts is identical because it comes from a small number of suppliers, principally NPR and Public Radio International (PRI).³² We understand that fewer than 45 percent of the programming hours of all public radio stations are produced locally, leaving more than 55 percent of programming coming from common sources.³³ Thus, the costs of auditing music use and determining appropriate royalty distributions are much smaller for public radio websites than they are for the equivalent number of independent websites.
- c) Third, it is our understanding that NPR assists in the collection of music use and programming information from NPR-member stations. NPR, and its member stations, provide ASCAP's survey agent, Nathan Associates, with cue sheet information concerning music use during a sample survey period. [[]] The centralized data collection by NPR on behalf of a large group of licensees greatly reduces the administrative burden that would be imposed by a similar number of independent webcaster licensees.³⁴

Some Observed Minimum Fees

- 34. A review of several minimum fees observed in market and statutory settings indicates that a minimum fee that meets the willing seller standard is likely well below the fee proposed by the RIAA.
- 35. [[]]
- 36. We have also observed minimum fees in the experimental webcasting licenses offered by ASCAP, BMI, and SESAC for the performance of musical works on the Internet. While these fees are experimental, they reflect the collectives' expectations that licensees with limited ability or willingness to pay can be accommodated at significantly lower costs than the RIAA is proposing. These minimum fees, too, are for independent websites and do not impose any limits on music use. Thus, these minimum fees are available to webcasters that may offer multiple channels of music and that may entail higher music audit costs than the typical public radio website.

³² National Public Radio, "Percentage of Public Radio Programming by Program Source." (Hereinafter, Percentage of Public Radio Programming by Program Source.) In fact, almost 45 percent of public radio station programming comes from just two sources, NPR and PRI.

³³ See Percentage of Public Radio Programming by Program Source. About 43 percent of public radio station programming hours are produced locally.

³⁴ Of the 409 entities surveyed in the NPR Music Rights Survey, 293, or about 72 percent are NPR-members (including NPR, itself). (See National Public Radio, "NPR and Non-NPR Entities Surveyed in the NPR Music Rights Survey, 2000.")

37. The annual minimum fee set forth in the ASCAP license is \$264.³⁵ The BMI license requires an annual minimum fee of \$259 from websites with annual gross revenues of no more than \$12,000.³⁶ The SESAC minimum fee is \$150 annually,³⁷ and certain educational institutions and noncommercial entities are eligible for a minimum fee of \$100 annually,³⁸ with further discounts if they belong to groups or collectives of stations.³⁹
38. The last minimum fee we have observed applies in Canada, where the Copyright Act was amended in 1997 to establish rights for "equitable remuneration" for the public performance of eligible published sound recordings.⁴⁰ The Copyright Act set out certain special conditions; a noteworthy one imposes royalties of no more than \$100 on the first \$1.25 million of radio station or transmission system annual advertising revenues.⁴¹ The effect of this term is to grant minimum fees of \$100 per year to radio stations with small revenues.⁴²
39. All of the minimum fees identified above were set in contemplation of an independent licensee that did not offer the licensor any economies of scale in contract administration and music use audits.⁴³ In contrast, public radio webcasters offer significant economies of scale based on the single payor, common programming, and centralized music use reporting practices we described above.

³⁵ ASCAP Experimental License Agreement for Internet Sites on the World Wide Web – Release 3.0, Rate Schedule "A," Rate Schedule "B," and Rate Schedule "C."

³⁶ BMI Web Site Music Performance Agreement, p. 3.

³⁷ SESAC, Schedule "A," Internet/New Media Fee Schedule, Web Sites, - 2001.

³⁸ SESAC, Inc., Internet / New Media License Non-Commercial Amendment. Licensees eligible for the noncommercial rates must be qualified by SESAC as noncommercial entities and educational institutions or houses of worship.

³⁹ SESAC, Schedule "C," SESAC Internet Group License Discount Schedule. The discounts range from 4 percent for groups or collectives of 3 to 4 websites to as much as 11 percent for groups or collectives of 76 or more websites. We understand that this discount is not dependent on common programming or a single payor for the websites in the group or collective.

⁴⁰ Copyright Board of Canada, "Statement of Royalties to be Collected by NRCC for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Published Sound Recordings Embodying Musical Works and Performer's Performances of Such Works," Decision of the Board, August 13, 1999, p. 3. (Hereinafter, Decision of the Copyright Board of Canada.)

⁴¹ Decision of the Copyright Board of Canada, pp. 1-4.

⁴² Decision of the Copyright Board of Canada, p. 4. In addition, the minimum license fee for public performances of sound recordings by community systems in Canada was set by statute at \$100 per year.

⁴³ We have not made any inquiry into whether the statutory \$100 minimum fee in Canada covers administrative and auditing costs relating to small licensees or, on the contrary, reflects some subsidization of small-scale licensees. However, the minimum fees in the experimental Internet licenses are set by the musical works collectives themselves and thus would be expected to cover the costs of licensing a range of licensees, including independent webcasters with unique programming that use music significantly more intensively than do public radio webcasters.

40. We have not quantified the cost-savings that the RIAA will realize from dealing with public radio webcasters as a group rather than with an equal number of independent webcasters; however we believe those savings will be significant. On the one hand, the fact that 55 percent of programming is common across public radio stations (and current and prior broadcasts account for the bulk of website programming) may not translate fully into a 55 percent cost-savings for the RIAA because there are likely to be some fixed audit costs associated with tracking an additional website. On the other hand, the administrative savings from dealing with a single payor and with a single source of music use information for NPR-member stations likely saves significantly more than 55 percent of those costs.
41. In summary, the \$5,000 minimum fee per website proposed by the RIAA is clearly excessive in comparison to other minimum fees we can observe. Moreover, the fees we have discussed above are for independent webcasters with potentially intensive music use, while the minimum fee for public radio webcasters will apply to a large group of webcasters that offer the licensor significant economies of scale in administration and auditing. Thus, even the lowest of the minimum fees in the experimental Internet licenses for musical works and the minimum fee for Canadian radio stations may exceed the incremental cost to the RIAA of licensing public radio websites. In the absence of evidence demonstrating that the cost of licensing public radio websites exceeds the \$24,000 annual fee that we have proposed for public radio, such a minimum fee appears reasonable to us.⁴⁴

VI. Reasonable Fees for Public Broadcasters Not Party to This Proceeding

42. There is some number of public broadcasting entities that are not represented by NPR and the CPB in the current CARP proceeding and, therefore, are not contemplated in the fee proposed above. We understand that they are likely to be a collection of noncommercial educational radio stations at colleges and universities and other independent noncommercial radio stations or station groups, such as the noncommercial stations described by Mr. Davis.⁴⁵ The CARP Panel requested that we give some thought to a reasonable fee structure for these nonCPB-qualified public broadcasters in the event they require webcasting licenses.
43. The extent of our understanding of these nonCPB-qualified public broadcasters is that they are likely to have small audiences, their music use may vary widely, and

⁴⁴ The fee translates to \$85.71 for each of the 280 public radio websites that we estimate currently may be active. As we noted in our first report, the \$24,000 fee we propose accurately reflects public radio web activity at the beginning of 2001. Due to Internet growth since the inception of the DMCA, this fee may overstate reasonable fees for 1999 and 2000, but the overstatement may be offset by some understatement of fees for the latter part of 2001 and for 2002. (See Murdoch and Woodbury written testimony, paragraph 58.)

⁴⁵ See oral testimony of Mr. Joe D. Davis, pp. 8553-8555.

they are likely to program independently of each other. Mr. Davis characterized the noncommercial stations represented by the National Religious Broadcasters Music License Committee (NRBMLC) as typically being very small stations with limited funding sources in the form of community contributions.⁴⁶ He also noted that, while some of these are music stations, the programming format of the vast majority is religious talk and teaching.⁴⁷ Earlier, we discussed that, in some cases, it will be reasonable for a licensor to collect a minimum fee from very small licensees and to engage in minimal contract monitoring and little to no music use auditing activity. Although we have insufficient evidence to say so with certainty, such may be the case with these small, independent stations. In such a case, a very low minimum fee might be reasonable, perhaps one on the order of the \$100 minimum fee in the SESAC noncommercial Internet license. However, we lack additional information about these stations which would shed light on their scale, music use, and website activities, and therefore, we cannot comment with confidence about precise reasonable fee structures or minimum fees for them.

⁴⁶ Oral testimony of Joe D. Davis, p. 8554-8555.

⁴⁷ Oral testimony of Joe D. Davis, p. 8553.

Appendix A

1. In this appendix, we compare the revenue-based fee rates paid by commercial radio and public radio at the time of the Public Broadcasting CARP decision.
2. In 1998, the CARP Panel set annual flat fees for public broadcasters of \$3,320,000 for use of the ASCAP repertory and \$2,123,000 for use of the BMI repertory.¹ In our previous report, we allocated 21 percent of these aggregate fees to public radio, on the basis of radio's share of total public broadcasting program expenses. This allocation implies annual public radio fees of \$697,200 for the ASCAP repertory and \$445,830 for the BMI repertory. Public radio station revenues in 1998 were \$484,268,000.² Thus, the effective fee rates for public radio in 1998, expressed as a percent of revenues, were .14 percent for the ASCAP repertory and .09 percent for the BMI repertory.
3. Although we lack an explicit statement of the ASCAP and BMI commercial radio music license fee rates, we were able to derive those fee rates from information in the Report of the Panel in the Public Broadcasting CARP proceeding. The formula used by ASCAP and BMI is of the general form:

PB Proposed Fee = Commercial Radio Fee Rate x PB Revenues x Music Adjustment,

where "PB" refers to public broadcasting. We rearranged this formula and solved for the commercial radio fee rates charged by ASCAP and BMI:

Commercial Radio Fee Rate = PB Proposed Fee / (PB Revenues x Music Adjustment).

For ASCAP, the calculation was:

$$\text{ASCAP Commercial Radio Fee Rate} = \$3,370,000 / (\$276,484,000 \times .96) = 1.27\%.$$

For BMI, the calculation was:

$$\text{BMI Commercial Radio Fee Rate} = \$1,395,000 / (\$483,447,000 \times .31) = .93\%.$$

Thus, commercial radio paid revenue-based fee rates of 1.27 percent to ASCAP and .93 percent to BMI in 1998.³

¹ The annual flat fees were set for 1998 and every subsequent year through 2002. (See, Report of the Panel, Public Broadcasting CARP, p. 38.)

² Corporation for Public Broadcasting, *Public Broadcasting Revenue, Fiscal Year 1999, Final Report*, Table 2.

³ Data sources are: Report of the Panel, Public Broadcasting CARP, pp. 12-17; Corporation for Public Broadcasting, *Public Broadcasting Revenue, Fiscal Year 1995*, Table 2; and, Corporation for Public Broadcasting, *Public Broadcasting Revenue, Fiscal Year 1997, Final Report*, Table 2. While ASCAP used public radio's 1995 "private" (nontax-based) revenues and BMI used public radio's 1997 total revenues, the use of different revenue bases does not affect the validity of the calculated fee rates for commercial radio.

4. Public radio pays ASCAP effective fee rates that are 11 percent of the fee rates that commercial radio pays ($.0014/.0127 = .11$). Similarly, public radio pays BMI effective fee rates that are 10 percent of the fee rates that commercial radio pays ($.0009/.0093 = .10$).⁴

⁴ If we had allocated the public broadcaster ASCAP and BMI fees set by in the Public Broadcasting CARP on the basis of relative *revenues* of public radio and public television, the public radio broadcasters ASCAP and BMI fees would be \$830,000 (25 percent of 3,320,000) and \$530,750 (25 percent of \$2,123,000), respectively. (See Murdoch and Woodbury written testimony, footnote 28 for the public radio share of public broadcasting revenues.) Thus, public radio's ASCAP fee rate would be .17 percent of revenues (\$830,000 divided by \$484,268,000), which is 13 percent of the commercial radio fee rate for the ASCAP license (.17 percent divided by 1.27 percent). Similarly, public radio's BMI fee rate would be .11 percent of revenues (\$530,750 divided by \$484,268,000), or 12 percent of the commercial radio fee rate for the BMI license (.11 percent divided by .93 percent).

Appendix B

Calculation of Reasonable Blanket License Fees for Sound Recordings Performed on Websites of National Public Radio, NPR-Member Stations, Minnesota Public Radio, and CPB-Qualified Stations for October 1998 Through December 2000 and January 2001 Through 2002

Fees for Rights in Musical Works:

Public broadcasting fee for ASCAP and BMI compositions	\$5,443,000
SESAC share of ASCAP and BMI payments per Digital Audio Services CARP	3%
Factor to apply to ASCAP and BMI fees to reflect payment for SESAC compositions	103%
Estimated public broadcasting fee for ASCAP, BMI, and SESAC compositions	\$5,606,000
Public radio share of public radio and public television programming expenses	21%
Estimated public radio fee for broadcasting ASCAP, BMI, and SESAC compositions	\$1,177,000

Fees for Rights in Sound Recordings:

Estimated hypothetical public radio fee for broadcasting sound recordings in ASCAP, BMI, and SESAC compositions	\$1,177,000
Classical music programming expenses relative to nonclassical music programming	68%
Estimated hypothetical public radio fee for broadcasting classical music compositions	\$800,000
Estimated hypothetical public radio fee for broadcasting sound recordings	\$1,977,000
Public radio web audience as a percent of public radio broadcast audience	1.20%
Public radio website fee for public performance of sound recordings	\$24,000
Fee for 27 months beginning in October 1998 and ending December 2000 (\$24,000 x 27/12)	\$54,000
Fee for 12 months beginning January 2001 and ending December 2001 (\$24,000 x 1.03)	\$24,720
Fee for 12 months beginning January 2002 and ending December 2002 (\$24,720 x 1.03)	\$25,462

Notes:

All fee calculations are rounded to the nearest thousand dollars.

Fees calculated for 2001 and 2002 include an annual 3 percent adjustment for the cost of living allowance set out in the Services' proposed terms and conditions.